



HARRIS, WILTSHIRE
& GRANNIS LLP

REDACTED – FOR PUBLIC INSPECTION

October 24, 2017

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

ACCEPTED/FILED

OCT 24 2017

Federal Communications Commission
Office of the Secretary

Re: *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123; *Structure and Practices of the Video Relay Service Program*, CG Docket No. 10-51

Dear Ms. Dortch:

DOCKET FILE COPY ORIGINAL

In accordance with the *Second Protective Order* for the above-referenced proceedings, Sorenson Communications, LLC (“Sorenson”) herein submits a highly confidential version of the attached ex parte in the above-referenced proceedings.

Sorenson has designated for highly confidential treatment the marked portion of the attached document pursuant to the *Second Protective Order* in CG Docket Nos. 03-123 and 10-51.¹ Sorenson’s comments include granular data with respect to its costs for VI training. As such this material falls under the enumerated item in Appendix A of the *Second Protective Order*:

2. Information that provides granular information about a Submitting Party’s past, current or future costs, revenues, marginal revenues, or market share, and future dividends.

Pursuant to the protective order and additional instructions from Commission staff, Sorenson is filing a redacted version of the document electronically via ECFS, one copy of the Highly Confidential version with the Secretary, two copies of the redacted version with the Secretary, and sending copies of the highly confidential version to Eliot Greenwald and Robert Aldrich of the Consumer and Governmental Affairs Bureau and the TRS Reports mailbox.

No. of Copies rec'd _____
List ABCDE

¹ *Structure & Practices of the Video Relay Service Program; Telecommunications Relay Services & Speech-to-Speech Services for Individuals with Hearing & Speech Disabilities*, Second Protective Order, DA 12-858, 27 FCC Rcd. 5914 (Cons. & Gov’t Affs. Bur. 2012).

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Please contact me if you have any questions or require any additional information.

Sincerely,

A handwritten signature in black ink, appearing to read 'John T. Nakahata', written in a cursive style.

John T. Nakahata
Counsel to Sorenson

Attachment

cc: Eliot Greenwald
Robert Aldrich
TRSRports@fcc.gov



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VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Federal Communications Commission
Office of the Secretary

Re: *Structure and Practices of the Video Relay Service Program*, CG Docket No. 10-51;
*Telecommunications Relay Services and Speech-to-Speech Services for Individuals with
Hearing and Speech Disabilities*, CG Docket No. 03-123

Dear Ms. Dortch:

Sorenson Communications, LLC ("Sorenson") urges the Commission to protect VRS providers' trade secrets and investments by allowing providers to enter into reasonable noncompete agreements with their employees. Sorenson invests a substantial amount in training its video interpreters ("VIs"), and noncompete clauses are necessary to both protect Sorenson's significant investments and ensure the confidentiality of trade secrets. In addition, while several reply commenters repeat their claims that noncompete clauses harm the VRS market, they continue to offer no evidence to support these claims.

1. Noncompete clauses are needed to protect VRS providers' investments in training and their confidential information.

As Sorenson argued in response to Part III and Sections IV.C-E and G-H of the Commission's Further Notice of Proposed Rulemaking, released March 23, 2017,¹ restricting noncompete clauses will only harm the VRS market by discouraging VRS providers from extensively training their VIs.² Sorenson spends a substantial amount on training. *****BEGIN
HIGHLY CONFIDENTIAL*****

¹ *Structure and Practices of the Video Relay Service Program*, Report and Order, Notice of Inquiry, Further Notice of Proposed Rulemaking, and Order, 32 FCC Rcd. 2436 (2017).

² Comments of Sorenson Communications, LLC, Regarding Part III and Sections IV.C-E and G-H of the Further Notice of Proposed Rulemaking at 35-38, CG Docket Nos. 10-51 and 03-123 (filed May 30, 2017) ("Sorenson Comments"); Reply Comments of Sorenson Communications, LLC, Regarding Part III and Sections IV.C-E and G-H of the Further Notice of Proposed Rulemaking at 4-14, CG Docket Nos. 10-51 and 03-123 (filed June 26, 2017) ("Sorenson Reply Comments").

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The limited noncompete clauses Sorenson utilizes—which, where permitted by state law, are limited to 6 months for the provision of VRS in the same geographic area—help ensure that other providers cannot unfairly take advantage of Sorenson’s investments. Without this assurance, Sorenson will be discouraged from investing this much in training. As a result, prohibiting noncompete clauses will hurt VRS consumers.

It would be particularly harmful if the Commission were to require VRS providers to let their VIs work concurrently for competitors. In the first instance, as Sorenson noted in its opening and reply comments, the Commission's Final Notice of Proposed Rulemaking does not ask about noncompete clauses that apply during employment,³ and thus the Commission lacks notice to adopt such a rule.⁴

Although ZVRS and Purple appeared to ask the Commission to adopt this extreme requirement in their opening comments,⁵ they seemingly abandoned this proposal in their reply comments—and for good reason. Not only would this proposal undermine the duty of loyalty that current employees owe their employers and put confidential information at risk; it would also guarantee that competitors would be able to free ride off another VRS provider’s investments in training. Indeed, these are likely the reasons why ZVRS itself prohibits its current employees from working for competitors.⁶

In contrast to Sorenson, no other providers have offered any evidence of how much they spend on training. They instead point only to the requirement that VIs must be “sufficiently trained to effectively meet the specialized communications needs of individuals with hearing and speech disabilities.”⁷ But Sorenson believes that providers should go beyond this regulatory minimum in order to promote functional equivalence. Reasonable noncompete clauses allow Sorenson to do that.

³ Sorenson Comments at 36; Sorenson Reply Comments at 5.

⁴ See 5 U.S.C. § 553; Sorenson Reply Comments at 6.

⁵ See Comments of ZVRS Holding Company, ZVRS and Purple Communications on Notice of Inquiry and Further Notice of Proposed Rulemaking Sections IV.C-E and G-H at 7, CG Docket Nos. 10-51 and 03-123 (filed May 30, 2017).

⁶ See Email from Gregory Hlibok to Michael Maddix (Oct. 14, 2016, 7:51 a.m.).

⁷ 47 C.F.R. § 64.604(a)(1)(i).

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2. State laws adequately protect employees from harmful and overbroad clauses.

As Sorenson argued in its comments,⁸ nothing in the record supports a conclusion that state laws inadequately balance employer and employee interests, including the employee's interests in working for a competitor. The appropriate balance of these interests is not unique to VRS, nor does it have unique ramifications for the delivery of functionally equivalent VRS. States have extensive experience regulating employment relationships, and they are best situated to determine what enhances the welfare of their citizens. Sorenson respects states' judgments on such issues. In states that have limited noncompete clauses, Sorenson has ensured that its employment agreements comply with the applicable laws, and it will continue to do so.

3. No evidence supports a prohibition on noncompete clauses.

In their reply comments, several VRS providers continue to offer assertions about the effects of noncompete clauses on the VRS market. What none of the commenters have provided is any evidence that supports their claims that they have been unable to hire enough VIs to meet consumer demand. The Commission should especially require some particularized showing beyond general statements given that state laws already regulate non-compete clauses. Absent this evidence, the Commission should not take the drastic step of *per se* prohibiting noncompete clauses nationwide for VRS and preempting state law.⁹

4. The Commission lacks the legal authority to ban noncompete clauses.

As Sorenson argued in its opening and reply comments, the Commission lacks authority under Section 225 or any other statutory provision to prohibit VI noncompete agreements. Like the opening comments, many reply comments did not address the question of the Commission's legal authority. And those that did offered incomplete and incorrect legal analysis. For example, although ZVRS and Purple repeated their argument that Section 225(d)(1)(A) allows the Commission to ban noncompete clauses, they failed to acknowledge that the Commission has only used the provision to regulate operational aspects of VRS, not employment matters.¹⁰

⁸ Sorenson Comments at 39; Sorenson Reply Comments at 12–13.

⁹ One concern that has been raised is that VRS VIs “fear . . . legal repercussions if a decision is made to switch VRS companies” due to the standard form letters that Sorenson sends to its former employees reminding them of their contractual obligations. *See Ex Parte of Angela Packard* at 1, Docket Nos. 10-51 and 03-123 (filed Sept. 22, 2017). But no concrete record evidence supports the contention that such fears have impeded VRS providers from recruiting qualified VIs.

¹⁰ Reply Comments of ZVRS Holding Company, ZVRS and Purple Communications on Notice of Inquiry and Further Notice of Proposed Rulemaking Sections IV.C-E and G-H at 7–9, CG Docket Nos. 10-51 and 03-123 (filed June 26, 2017).

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Unsurprisingly, neither they—nor the other commenters—have cited to any precedent for using the provision to regulate employee contracts.

GlobalVRS's reply comments also contain flawed legal analysis. GlobalVRS argued that because "[a]ll providers voluntarily submit to Commission regulation as a condition for providing VRS under the Program," the Commission can restrict noncompete clauses.¹¹ This, of course, is not true. The Commission cannot impose any conceivable restriction on VRS providers; it can only regulate VRS providers to the extent authorized by statute. Because no statute authorizes the Commission to regulate employment matters, the Commission lacks the authority to ban noncompete clauses.

Please contact me if you have any questions or require any additional information.

Sincerely,



John T. Nakahata
Counsel to Sorenson Communications, LLC

¹¹ Reply Comments of ASL Services Holdings, LLC DBA GlobalVRS to Notice of Inquiry on Service Quality Metrics for VRS, Part III and Further Notice of Proposed Rulemaking, Sections IV.C-E and G-H at 7, CG Docket Nos. 10-51 and 03-123 (filed June 26, 2016).